IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

SONOS, INC.	*	June 22, 2021
	*	
VS.	*	CIVIL ACTION NO. W-20-CV-881
	*	
GOOGLE LLC	*	

BEFORE THE HONORABLE ALAN D ALBRIGHT
DISCOVERY HEARING (via Zoom)

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

(June 22, 2021, 3:16 p.m.)

DEPUTY CLERK: Discovery hearing in Civil Action W:20-CV-881, styled Sonos, Incorporated versus Google LLC.

MR. SIEGMUND: Good afternoon, Your Honor. This is Mark Siegmund on behalf of plaintiff Sonos. With me today is Alyssa Caridis from Orrick. Also with us is Sean Sullivan, Matt Sampson and Cole Richter from Lee Sullivan Shea & Smith.

Myself and Mr. Sullivan will be doing the majority of speaking today on behalf of plaintiff.

THE COURT: Very good. Welcome to all.

MR. BURBANK: Good afternoon, Your Honor. Paige Amstutz and Stephen Burbank with Scott Douglas & McConnico on behalf of Google. With us is our co-counsel, Lindsay Cooper from Quinn Emanuel, and also with us is Patrick Weston, who is in-house counsel for Google.

Ms. Amstutz will be handling the procedural issues regarding the transfer briefing, and Ms. Cooper will handle the substantive discovery disputes.

THE COURT: Always good to have dueling law clerks -- former law clerks on the -- there's equity of dignity here with one on each side. So -- and of course one of you's my favorite.

So I'll let you all take up whatever the issues are.

MS. AMSTUTZ: Your Honor, I think the procedural issues are pretty low-hanging fruit, if the Court would like to tackle

those first.

THE COURT: Sure.

MS. AMSTUTZ: On behalf of Google, I come to the Court with two very specific asks with regard to the upcoming transfer reply brief.

The first is, we would ask for a modest four-day extension on the reply brief deadline.

The second is, we would ask for five additional pages in addition to the five pages afforded under the current version of the local rules.

With regard to the timing issue, by way of background, as Sonos pointed out in its e-mail, back in mid-May we negotiated a briefing schedule whereby Sonos would file its response brief on June 15th, which was last Tuesday, and Google would file its reply brief on June 25th, which is this upcoming Friday.

We've now ask to extend that deadline to Tuesday, June 29th, which is four days on its face but actually only two business days. Sonos has not agreed to any extension, but I want to give the Court very briefly three reasons why it's warranted here.

First, on June 8th, the Court entered its amended order on venue briefing, which sets the default deadline for replies at two weeks past the response date. Our request falls directly in line with what the presumptive deadline is going to be in this Court going forward. June 29th falls exactly two weeks

after the response deadline.

When we negotiated that briefing schedule back in mid-May, we did not have Sonos' response obviously. But now we do, and it is very fulsome. It's -- there's a lot to address, and there's 46 exhibits we have to deal with in our reply.

And lastly, Your Honor, that briefing schedule was negotiated in the context of a July 15th Markman hearing. The parties diligently wanted to give the Court plenty of time to get through the transfer issues before that Markman hearing.

Yesterday the Court moved the Markman hearing by three weeks to August 6th, so any adverse impact that a four-day extension would have had on the Court's ability to rule on the transfer issue is diminished given that the Markman hearing is now pushed out until August 6th. So with that, we ask for the four days.

But for a lot of those same reasons, if not the -- all of them, we also need five additional pages in addition to the five afforded under the current rule. And I say the "current rule" because, as I pointed out to Sonos' counsel, those local rules are about to be amended. The amendments, as the Court knows, are literally sitting on the Fifth Circuit's desk, and the operative rule here, Rule 7(e), is going to be amended to allow ten pages for a reply brief in the context of a motion to transfer. So again, our request is completely in line with that forthcoming rule change.

So, Judge, in sum -- oh, I will say, in our meet-and-confers, Sonos has agreed to give us seven pages, not ten. So really I'm asking for three beyond what they've agreed to.

So, Judge, we would ask for that four-day extension, the five additional pages for a total of ten, and I assure the Court, and I hope the Court knows, that if Google did not really need this, I would not be burdening the Court with these types of procedural issues.

MR. SIEGMUND: Your Honor, if I can very briefly respond to that.

THE COURT: Sure.

MR. SIEGMUND: Your Honor, I think I can save the Court a little bit of time here.

Regarding the timing issue, our position's pretty simple on this matter. We think that the parties should abide by the agreements they enter into, especially whenever they're filed with the Court. However, now that we understand that Google's position is that they are requesting an extension of time on the parties' agreement, we're okay with June 29th.

So we are not opposed to them filing their reply brief on June 29th rather than what the parties agreed to, which was the 24th. So we're okay with that --

THE COURT: I've heard of deathbed conversions. This is sort of like a hearing with the Judge convert. I probably

ought to write a book about this, so...

MR. SIEGMUND: So we are -- we're okay with that, Your Honor. However, we don't believe that doubling Google's reply brief to ten pages is a reasonable request, given that this is a motion to transfer venue and this is a non-dispositive motion.

As Your Honor's aware, the local rules provide for a five-page reply brief. Not only that, I -- even if the Western District of Texas local rules are pending before the Fifth Circuit, the Court's OGP says five pages for a reply brief concerning a motion to transfer venue, and that's on Page 5 of the OGP.

So for this non-dispositive motion, we do not think that doubling the amount of pages is reasonable. And as Ms. Amstutz suggested, we did suggest a compromise of seven pages, and we think that's reasonable.

THE COURT: I thought you were going to point out that your brethren, Stephen Burbank, was acting with some level of treason and -- as a former law clerk in arguing that anyone should get more pages since I'm sure there was time when he joined in with my other law clerks in saying any amount of pages is too much.

But tell me again how long your response was.

MR. SIEGMUND: Your Honor, our response was exactly in line with the OGP, 15 pages.

THE COURT: What I'm going to do is, I will -- just say, I'll split the baby. I'll give the defendant eight pages. And so -- but they have to keep the same font, like, you can't make little -- I'm kidding.

So what else do we have to take up?

MS. COOPER: Your Honor, we've also got a discovery dispute regarding venue. Before I get into the issues, I just wanted to note that Patrick Weston, in-house counsel at Google, I think he's trying to get into the Zoom. I'm not sure if somebody needs to let him in, but I just wanted to mention that in case that is the case.

With respect to the issues, Google is asking for information from Sonos regarding certain forum selection clauses in certain agreements between the parties.

Google's transferred -- move to transfer based on these forum selection clauses. They require that disputes regarding the agreement be litigated in California, and the parties executed six of these agreements between 2013 and 2015.

The key agreement about which we're seeking discovery is called the "Content Integration Agreement," or the CIA, and the parties have a dispute about what that agreement covers.

Google's position is that the agreement applies to the parties' collaboration during this time period, 2013 to 2015. During that time period, the parties collaborated on the functionality that Sonos is now accusing of infringing two of

the patents-in-suit. The parties worked closely together for two years. They worked closely together on the functionality that's now accused in this case.

Google and Sonos had NDAs and other agreements covering that relationship. Google allowed Sonos to be part of its confidential development process.

That's our position. These agreements apply to that collaboration and they relate to this case and they require this case to be transferred.

Sonos doesn't agree with us, but they haven't actually told us their position as to what the agreements do cover. All they've said is, we don't think Google has met its burden to demonstrate that the agreements, you know, relate to this case or relate to the parties collaboration.

But the question before you is a question for Sonos, which is: If the agreements don't apply to the collaboration, then what do they apply to?

We'd like to get an answer to this question so we can address Sonos' position in our reply brief rather than seeing it for the first time on surreply. And we think it's important, because Sonos can't argue that we haven't met our burden to show the agreement applies while at the same time withholding their position on that very issue.

MR. SULLIVAN: Your Honor, this is Sean Sullivan. Could I respond to that briefly?

THE COURT: Of course. That's why we're here.

MR. SULLIVAN: Thank you, Your Honor.

So yeah. I think there's a little bit of -- the CIAs are really a red herring here. They're not related to the infringement issues in this case.

So just by way of background, and a lot of this is laid out in our opposition brief to the transfer motion as well, but the patents have a priority date here back to 2011.

These agreements, which are covering a very narrow commercial implementation of a feature, between Sonos and Google aren't relevant to whether or not Google's products infringe Sonos' patents. Those agreements were in 2013.

There's no argument here by Google that there's some type of a breach of that agreement, that there's some type of an ownership defense or a license defense from that agreement here. They just aren't relevant to the issue of venue that we're dealing with here.

The forum selection clauses are tied to and related to that agreement. That agreement is not at issue here in this case as far as any defenses go from Google's standpoint.

Google tries to argue that, well, it's the whole collaboration that is relevant to some inequitable defenses that we may have. Again, that's fine for purposes of substantive discovery on the merits, but that's not relevant to the issue of venue. It's not relevant because that forum

selection clause and that agreement is not at issue here.

MS. COOPER: Your Honor, if I could respond to that.

The fact that the patents claim priority to before this agreement actually demonstrates why this agreement is so relevant.

If Sonos had patents covering the functionality that the parties worked on together between 2013 and 2015 but actually invented it in 2011, what we would expect to see is an explanation from Sonos, you know, when they first started working together, we know all about this; we invented this two years ago.

That didn't happen. Instead what we see is Sonos working closely with Google, supporting them, helping them develop the accused functionality, posing technical questions to them, giving feedback to them. At no point in the collaboration did they ever say, we have patents that read on a product you're developing.

It's this behavior, coupled with the execution of the CIA, which actually provides that any intellectual property coming out of the collaboration is owned by Google, that gives rise to our equitable defenses.

Our position is not that this case should be transferred because we have an express license to Sonos' patents or that we own Sonos' patents. That's not our position.

Our position is that the case should be transferred

because the agreement is one part of the course of conduct that Sonos participated in that led us to understand that it either had no intellectual property rights that bared on the functionality we were developing or that it didn't intend to enforce any intellectual property rights it had.

MR. SULLIVAN: Go ahead, Your Honor.

THE COURT: I'm missing -- Ms. Cooper, I -- hopefully when I say this now, when I say, I don't understand something, it's not like if you spoke in Mandarin, I'd say I don't understand Mandarin. I understand what you just argued.

I don't understand why it's relevant to venue. I'm not able to -- I mean, what you're asking for is something that I think you will certainly be entitled to in full discovery.

My understanding, generally speaking, I'm relatively strict with discovery prior to the Markman unless it has some real relationship to venue, and I'm not following that here.

I certainly understand why it may be -- it may be the key document at trial, I get that. But for right now, all I'm -- all I care about for right now is: Does the case belong here or somewhere else?

And I can't figure out why this document would change my mind in one direction or the other.

MS. COOPER: If I could respond to that.

So the document we're talking about, the CIA, it incorporates a California forum selection clause. So the

document we're talking about is actually the basis for our motion to transfer.

THE COURT: Got it. Okay. Got it. So -- yes, sir, Mr. Sullivan.

MR. SULLIVAN: Your Honor -- yeah.

So there is a forum selection clause, again, for that agreement. If there was a breach of that agreement, if there was a license in that agreement, then it might be implicated.

But like you said, Your Honor, it's not relevant -- the collaboration's not relevant to venue. This agreement -- there's no way that the forum selection clause is being invoked in this case. There's no breach of the agreement. There's no argument that there's a license or an ownership issue here as -- pursuant to that agreement --

THE COURT: Mr. Sullivan, it sounds to me like we're talking about one discrete document, is that fair, or something that's a relatively discrete document or documents?

MR. SULLIVAN: Well, the agreement is, you know, is an agreement, but they're asking for all the discovery that is related to the collaboration.

You know, I think she pointed out it's 2013 to 2015. They're asking for all the stuff that the parties talked about and discussed and did as part of the collaboration, and I agree that's going to be relevant at some point.

It's just -- the only way this whole thing is relevant for

purposes of venue is through that forum selection clause, and it's just not going to be invoked here. There's no defense or charge of infringement that implicates that forum selection clause.

MS. COOPER: And, Your Honor, if I could respond to that.

So when we brought this dispute to the Court, we were seeking substantive information regarding the document and how it applied to the parties' collaboration.

At this point our reply brief is due one week from today. The information we really need in order to write our response and not be surprised by Sonos' position coming up for the first time in the surreply is, we need to understand what Sonos contends the agreement covers.

We've put forward our position. They've said we haven't met our burden to establish that it does relate to the collaboration. What we're missing here is: What does Sonos believe it contends to -- applies to?

They're a party to the agreement. That's what we're trying to understand.

THE COURT: If you have the agreement, does -- how far does that get you?

MS. COOPER: Well, it gets us subways, because we can give our understanding of what the agreement covers based on the plain language of the agreement, based on the date of the agreement, but Sonos has said they don't agree with that. They

don't think it covers --

THE COURT: I get that. I get what they said. What I'm trying to find out here is: If I have them provide the agreement to you, are you -- is that sufficient for what you need, or do you need more than that?

I maybe asked my question poorly.

MS. COOPER: I see. We have the agreement, so we would need more than just the agreement. I think a targeted interrogatory asking them what they contend it applies to, if not the parties' collaboration, would get us what we need.

THE COURT: Okay. I'm going to deny that request.

What else do we have to take up today? Anybody?

MR. SIEGMUND: Nothing from plaintiff, Your Honor.

THE COURT: Okay. Very good. If you all need anything else -- which clerk is on the case?

MR. SIEGMUND: Hannah, Your Honor.

THE COURT: That is my favorite clerk.

So y'all have a good day. I appreciate your time here. And if you need anything else, let Hannah know, and I'll get to it as quickly as I can. Take care.

(Hearing adjourned at 3:35 p.m.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 23rd day of June 2021.

/s/ Kristie M. Davis

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